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In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE UNITED STATES SENATE TO DISMISS

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Appellee United States Senate moves to dismiss this appeal on the ground that it is brought by a party that prevailed in the court of appeals and thus is not properly presented to this Court. The facts and the statutes involved are set forth fully in the jurisdictional statement of the appellant in this case and in the petition for certiorari filed simultaneously with this motion by the United States Senate. The motion to dismiss is pursuant to Rule 16.1(a) and (d) of this Court.

This appeal has been brought by a party that prevailed in the court of appeals, in violation of one of the most elementary rules of appellate practice and jurisdiction.[1] In the court of appeals, the Immigration

[1] The Immigration and Naturalization Service brought this appeal under 28 U.S.C. 1252, which affords an appeal to this Court as of right in a case where an Act of Congress has been

and Naturalization Service ("INS") agreed with appellee Chadha that Section 244(c)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254(c)(2), was unconstitutional. The United States Senate and House of Representatives ("congressional appellees") appeared as amici curiae to defend the statute. INS's argument was successful and the court of appeals declared the statute unconstitutional. Following judgment, the congressional appellees intervened as parties, seeking, at first, rehearing, and when that was denied, petitioning this Court for certiorari.

Although INS prevailed below, it has also appealed, not seeking to present this Court with errors in the judgment below, but requesting that this Court affirm that judgment. As this Court noted only last year, "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty National Bank* v. *Roper,* 445 U.S. 326, 333 (1980). This Court consistently enforces that elementary rule by dismissing appeals like INS's filed by the party which prevailed in the court below. See, e.g., *Public*

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declared unconstitutional. It is settled that statutes like 28 U.S.C. 1252 are meant only to assure that the aggrieved party has an appeal as of right, not to disrupt the orderly adjudication of such cases by allowing prevailing parties to appeal. *See Gunn* v. *University Committee To End The War In Viet Nam*, 399 U.S. 383, 390 n.5 (1970).

Such statutes do not authorize the party prevailing on a challenge to the constitutionality of a statute to appeal even when that party is technically aggrieved because it loses the case on another issue. *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U.S. 376, 377–78 (1903) (dismissing appeal by party whose challenge to statute succeeded, because "[w]ith regard to the [constitutional] ground, the decision of the Circuit Court again was in favor of the plaintiff, and it has nothing of which to complain.")

Service Commission v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) ("The Public Service Commission as the successful party below has no standing to appeal. . . ."); *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934); *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934).[2] For this Court to open its jurisdiction to appeals by prevailing parties would lead to the Court's reviewing opinions rather than judgments[3] and to its aiding parties without any concrete needs. It would reduce the finality of the judgments of the court of appeals while needlessly expanding this Court's docket, and would similarly disrupt, by extension of the principle, the relations of the courts of appeals and the district courts, all to the detriment of the proper functioning of the appellate system.

Prior to this case, the past experience in the rare cases involving the executive and legislative branches has been for one branch to appear as a party and the other as an amicus curiae, and for the Department of Justice to appeal if necessary to obtain appellate review for the *aggrieved* branch. For example, in *United States* v. *Smith*, 286 U.S. 6 (1932), the Senate

[2] The same practice applies under the certiorari statute, 28 U.S.C. 1254(1). Indeed, "while some winning parties have attempted to petition for certiorari, there appears to be no recorded instance where the Court . . . has granted a petition filed by a party who prevailed on the merits in the court of appeals." R. Stern & E. Gressman, SUPREME COURT PRACTICE 58 (5th ed. 1978).

[3] An appellant who prevailed below will not complain of error in the judgment in the court of appeals, only of statements in the opinion with which it disagrees. However, "[t]his Court . . . reviews judgments, not statements in opinions." *Federal Communications Commission* v. *Pacifica Foundation, Inc.*, 438 U.S. 726, 734 (1978), *quoting Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

was the aggrieved branch.[4] Accordingly, the United States Attorney for the District of Columbia instituted the proceeding on behalf of the Senate; the Attorney General appeared in opposition in the Supreme Court as amicus curiae. See 286 U.S. at 26, 29–30.

Following this pattern, in *United States* v. *Lovett*, 328 U.S. 303 (1946), federal employees, supported by the executive branch, challenged in the Court of Claims a statute denying them salaries. The House of Representatives adopted a resolution authorizing counsel to appear as amici curiae to defend the statute. A majority of the Court of Claims, in separate opinions, declared the statute unconstitutional. Since it represented the only governmental party in the case, the Department of Justice petitioned for certiorari. However, as the Solicitor General's brief in this Court carefully explained, the petition was filed to obtain review sought by amici representing the House, the aggrieved branch, as the challenger of the lower court's judgment.[5] Consistent with the petition

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[4] The Senate challenged respondent Smith's right to hold office after the Senate reconsidered his confirmation. The Attorney General supported respondent since the reconsideration occurred after notification of the President of the confirmation. *Compare* 286 U.S. at 7, *with id.* at 14.

[5] The Solicitor General explained in his brief:

> "The United States, against which judgments were rendered in the court below, has sought review of these cases because of the Government's belief that important constitutional issues are involved which should be determined by this Court and because *amici curiae*, representing the Congress (see *infra*, p. 8), having no independent means of access to the Court, requested that a petition for writs of certiorari be filed. . . . [¶]The *Amici curiae* contend that the [statute] is a valid exercise of the legislative power and that the judgments below are wrong. *The leg-*

for certiorari being filed at the behest of counsel for the House as the losing branch in the Court of Claims, two of the four questions presented, including one preliminary question about the justiciability of the case, were posed at the request of counsel for the House.[6]

The appellant is not utilizing these historical models. The INS's appeal is not for the purpose of enabling the Congress, as the aggrieved branch, to obtain review of the judgment of the court of appeals, but rather to enable the INS to obtain a repetition of that judgment. INS has notably failed to present to this Court the threshold questions which the congressional appellees believe would make it unnecessary to decide the constitutional issue in this case.

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islative branch which they represent *is therefore the challenger of the judgments below.*"

Brief for Petitioner at 2–3, *United States* v. *Lovett*, 328 U.S. 303 (1946) (emphasis supplied).

[6] The Solicitor General's brief stated:

"The questions presented in this Court are:

"1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' services in their government positions. . . .

"2. If the former, whether Section 304 is unconstitutional. . . .

"3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder prior to November 15, 1943, the United States incurred a legal obligation to pay respondents for services rendered after that date.[1]

"(4). Whether the Court of Claims was presented with justiciable controversies.

"[1] *Questions 3 and 4 are stated at the request of counsel for the subcommittee of the House Committee on Appropriations.*"

Brief for Petitioner at 3, *United States* v. *Lovett*, 328 U.S. 303 (1946) (footnote in original) (emphasis supplied).

Since the congressional appellees are simultaneously petitioning for certiorari for review of the judgment of the court of appeals, the INS's appeal to review that judgment is superfluous. Moreover, the INS's appeal would have the unfortunate practical effect of diverting the briefing and issues presented to this Court from their proper focus on the errors in the judgment of the court of appeals. Since INS supports the judgment, INS's appeal will not focus on the errors in the judgment, particularly the threshold matters of the need to reach the merits of the case and the critical question of nonseverability.[7] The "Question Presented" by INS, in its jurisdictional statement, addresses only the merits, and the "Statement" by INS relegates the threshold issues to a footnote since INS "agree[s] with the court of appeals' disposition of these issues." Jurisdictional Statement at 7 n.6.[8] In contrast to INS's appeal, the petitions by the congres-

[7] An aggrieved party focuses its appeal on the errors in the actual rationale of the court of appeals, leading to clearly structured appellate briefing and review. In contrast, a non-aggrieved party presents an amalgam of the actual rationale of the court of appeals, and what the non-aggrieved party desired as the rationale. The INS's statement amalgamates the argument against legislative review on bicameralism grounds, which the court of appeals adopted as part of its rationale, with an argument against legislative review on presidential veto grounds, which INS desired as the rationale but which the court of appeals did not adopt. Jurisdictional Statement at 14–18.

[8] INS's jurisdictional statement contrasts sharply with the petition for certiorari filed by the Solicitor General in *United States* v. *Lovett*, *supra*. As discussed above, the petition for certiorari in *Lovett* was filed at the behest of the losing branch below, and so it included a question concerning justiciability which that aggrieved branch sought to pose.

sional appellees, who disagree with the judgment of the court of appeals, will focus this Court's review on the errors in the judgment, particularly on the threshold issues.

To review the judgment of the court of appeals through INS's appeal, rather than through the petitions of the congressional appellees, will thus lead to an irregular briefing of the case. INS's initial brief will naturally not identify the key errors in the judgment of the court of appeals. The congressional appellees will be deprived of their proper procedural right to point out those errors, receive the executive's responsive brief in support of the judgment, and then reply to that brief. In this case, which presents separation of powers issues of major importance, novelty, and complexity, such irregular briefing will be a serious disservice to this Court.

CONCLUSION

Accordingly, this Court should dismiss INS's appeal. Alternatively, this Court should postpone jurisdiction and direct that briefing proceed under the grant of the petitions for certiorari filed by the Senate and the House.

Respectfully submitted.

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